88-481

Supreme Court, U.S.
FILED
AUG 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1988

INDUSTRIAL STEEL PRODUCTS CO., INC. AND
MOSHER STEEL COMPANY
Petitioners,

v.

ANN MCLAUGHLIN, Secretary of Labor,
United States Department of Labor,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT E. RADER, JR.
FREDERICK W. ADDISON, III
RADER, ADDISON & STORY, P.C.
2525 Stemmons, Suite 352
Dallas, Texas 75207
214/638-0933
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

In Camara v. Municipal Court, 387 U.S. 523 (1967) and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) this Court held search warrants are required to conduct administrative, regulatory inspections. In lieu of the showing of probable cause traditionally required under the Fourth Amendment, the Court held administrative warrants could issue upon a showing that "reasonable administrative standards" are satisfied with respect to a particular establishment. The issues here are:

1. What did this Court mean by "reasonable administrative standards?" Can an admittedly discriminatory enforcement scheme qualify as "reasonable?"

2. When an administrative warrant is challenged, does the administrative agency have the burden of demonstrating that its administrative standards for inspection are reasonable? Or was the court below correct in holding the business owner has the burden of affirmatively showing the administrative standards are unreasonable, and that the agency *intended* its standards for inspection to be unreasonable?

PARTIES TO PROCEEDING IN COURT BELOW

Industrial Steel Products Co., Inc. is located in Shreveport, Louisiana, and challenged the constitutional fairness of OSHA's administrative inspection plan in the United States District Court for the Western District of Louisiana. Mosher Steel Company is located in Houston, Texas, and raised a similar challenge in the United States District Court for the Southern District of Texas. On appeal to the Fifth Circuit the two cases were combined for oral argument, and the Fifth Circuit issued a joint opinion. Both parties join as petitioners to this Court.

The parent company of Industrial Steel Products Co., Inc. and Mosher Steel Company is Trinity Industries, Inc.

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NO. _____

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v.

ANN MCLAUGHLIN Secretary of Labor,
United States Department of Labor,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, INDUSTRIAL STEEL PRODUCTS AND MOSHER STEEL, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 31, 1988.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals *(see,* App. *infra)* is reported at 845 F.2d 1330.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on May 31, 1988. A timely Petition for Rehearing was denied on June 27, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment, United States Constitution, provides:

> The right of the people to be secure in their persons houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

Local OSHA officials in Shreveport and Houston obtained administrative warrants to inspect Industrial Steel Products and Mosher Steel, respectively. The warrants were based on CPL 2.45A, OSHA's administrative standard or "plan" for scheduling inspections of plants for which specific safety violations have not been reported. Under the Fifth Circuit's decision in *Brock v. Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985), OSHA was required to include its statewide industry ranking report in the warrant application, to enable the magistrate to determine whether the inspection plan is fair and nondiscriminatory. In both

Industrial Steel Products' case and Mosher Steel's case the industry ranking report, when read in conjunction with the relevant state manufacturers' directory, revealed that many high hazard businesses, including many direct competitors, were not included under the inspection plan and were *de facto* exempt from enforcement. The companies believed this information confirmed OSHA's inspection plan was discriminatory and unreasonable and provided for selective enforcement of the Occupational Safety and Health Act. Both companies therefore filed motions to quash the administrative inspection warrants. Separate hearings were held in Shreveport and Houston. In each case the federal magistrate declined to consider evidence of discriminatory enforcement and denied the motion to quash. Both companies appealed from the magistrate's findings of fact and recommendations. The district courts for the Western District of Louisiana and the Southern District of Texas adopted the magistrates' findings of fact and recommendations and denied the motions to quash. Industrial Steel Products and Mosher Steel appealed to the Fifth Circuit.

The Fifth Circuit acknowledged, in Industrial Steel Products' case, that more than half of Industrial Steel Products' direct competitors were excluded from enforcement and would never be inspected, while under CPL 2.45A Industrial Steel Products would continue to be inspected and reinspected at least once every three years. (Indeed, the Secretary of Labor, in her briefs, also conceded this to be true.) However, rather than requiring OSHA to reveal how its inspection list was compiled or why these competitors were exempted, the Fifth Circuit *excused the discriminatory enforcement because Industrial Steel Products had not proved it was intentional.* 845 F.2d at 1337. In effect, the Fifth Circuit held that OSHA has no obligation to take steps to make

sure its inspection plan is fair. Bureaucratic sloppiness that results in discriminatory, selective enforcement is permissable so long as it is not intentional. Moreover, the Fifth Circuit concluded that the business owner has the burden of proving OSHA's inspection plan is unreasonable and discriminatory, and also that the discriminatory enforcement was intentional. And in meeting that burden, the business owner may not go outside the four corners of the warrant application itself. 845 F.2d at 1337, 1332.

REASONS THE WRIT SHOULD BE GRANTED

Since this Court's decision in *Barlow's* there have been scores of lower court cases dealing with the proper showing of probable cause for an administrative inspection warrant. Circuit courts of appeals, district courts and state courts have divided on what constitutes "reasonable administrative standards" for purposes of inspection. One court has even lamented the "embarrassment of riches" in the number of OSHA warrant cases and in the disparities between circuits and even between districts and within districts as to what constitutes probable cause for an OSHA search. *In the Matter of Establishment Inspection of Urick Property,* 472 F.Supp. 1193, 1194 (W. D. Pa. 1979). Indeed, there have been numerous petitions to this Court by different business owners for further guidance on these administrative probable cause and scope of the warrant issues.

The Secretary of Labor has never liked the holding in *Barlow's* and has resisted complying with that decision. Over the course of the post-*Barlow's* litigation to shape the constitutional rights of business owners *vis a vis* OSHA the Secretary of Labor has adopted varying, inconsistent, even devious litigation strategies to win judicial holdings that the constitutional fairness of OSHA's administrative standard,

or "plan," for inspection is not subject to judicial review. In the instant case the Secretary took the position that OSHA may utilize any type of inspection plan it wants, even if the plan is discriminatory and enforces the law selectively, and the court must accept that plan as probable cause for a warrant under *Barlow's* unless the establishment owner can affirmatively demonstrate that an incomplete inspection list or other deficiency is the result of an intentional, capricious act on the part of OSHA officials.

Barlow's specifically holds the Secretary must affirmatively demonstrate that OSHA's inspection plan is reasonable and fair, and that the business to be inspected has been selected in a neutral, nondiscriminatory manner. However, in this case the Fifth Circuit adopted the Secretary's position and effectively reversed this rule. Rather than requiring the agency to affirmatively show its inspection plan is reasonable and fair, or to justify the exclusion of a large sector of high hazard businesses from enforcement, the Fifth Circuit held the business owner has the burden of proving *both* that the inspection plan is discriminatory *and* that OSHA *intended* to enforce the act in a discriminatory manner. 845 F.2d at 1337. In making such a showing the Fifth Circuit held the business owner may not go beyond the four corners of the warrant application itself. The Fifth Circuit thus imposed an impossible burden on a business owner who is the subject of discriminatory enforcement. How can a business owner *ever* prove that his competitors were *intentionally* left off the inspection list? He obviously cannot. The business owner is therefore left to endure the disruption to production and inconvenience to employer and employee alike of comprehensive OSHA inspections, year after year, while his competitors are not subjected to these disruptions and enforcement costs. The Third Circuit has noted that

even if the business owner operates a safe establishment in compliance with OSHA regulations, these repeated inspections put him at a competitive disadvantage.

> . . . a typical OSHA inspection is more than an unobtrusive scrutiny. Inspections of entire plants — referred to as 'wall to wall' in agency jargon — frequently extend over several weeks. They necessarily create inconvenience to the employer and a certain amount of lost time for employees who escort the inspector or are otherwise disrupted in their work. Even if no violations were found and no citations issued, an employer would not regard such an inspection as benign. (footnotes omitted).

Cerro Metal Products v. Marshall, 620 F.2d 964, 974 (3rd Cir. 1980).

The Fifth Circuit's decision makes a mockery of *Barlow's* insistence on Fourth Amendment protections for business owners. Under the Fifth Circuit's decision OSHA can, as a practical matter, devise any sort of enforcement scheme it wants. The agency can utilize an inspection list that excludes ninety-nine percent of the businesses in a state. Or the agency can enforce the Act against steel mills on the north side of the street but not on the south side. As long as the agency represents in the warrant application that its inspection scheme has been "properly applied," 845 F.2d at 1337, the court must rely on those representations and the inspection target has no remedy. Such a procedure amounts to a rubber stamp of OSHA's decision to inspect, and flies in the face of *Barlow's.*

In the present case Industrial Steel Products introduced evidence to show more than half of all high hazard businesses were exempt from enforcement under CPL 2.45A and that OSHA had omitted fifty out of ninety-two of Industrial Steel Products' direct competitors in Louisiana. The Fifth

Circuit acknowledged this evidence but held that was not enough; that Industrial Steel Products must also show, from the four corners of the warrant application itself, that this omission and discriminatory enforcement was intentional. It could be argued that the mere showing of such wide-spread, blatant, discriminatory enforcement in and of itself shows intent. It could hardly be an oversight. Nevertheless, the point is, that by requiring such a showing the Fifth Circuit has effectively reversed the Secretary's burden established in *Barlow's*, and negated the business owner's Fourth Amendment protections by taking away any practical possibility the business owner could *ever* effectively challenge an OSHA warrant.

CONCLUSION

The heart of the Fifth Circuit's decision is its statement that "OSHA is not required to demonstrate that the plan was applied neutrally to every establishment on the list." 845 F.2d at 1337. That holding is in direct conflict with this Court's statement in *Barlow's* that "reasonable legislative or administrative standards for conducting an inspection [must be] satisfied *with respect to a particular* [establishment]." 436 U.S. at 320, (emphasis added).

Petitioners respectfully request this court to therefore issue a writ of certiorari to review the opinion of the Fifth Circuit, and upon review to reverse the holding of the courts below; elaborate on the probable cause showing required for administrative warrants; reaffirm that the agency has the

burden to demonstrate its inspection plan is reasonable; and set forth the procedure for challenging the constitutional fairness of an agency's inspection plan.

Respectfully submitted,

ORIGINAL SIGNED BY
ROBERT E. RADER, JR.

ROBERT E. RADER, JR.
FREDERICK W. ADDISON, III
RADER ADDISON & STORY, P.C.
2525 Stemmons, Suite 352
Dallas, Texas 75207
(214) 638-0933

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to Ms. Barbara A. W. McConnell, U.S. Department of Labor, Office of the Solicitor, 200 Constitution Ave., N.W., Washington, D.C. 20210, on this 25th day of August, 1988

ORIGINAL SIGNED BY
ROBERT E. RADER, JR.

APPENDIX A

In the Matter of INDUSTRIAL STEEL PRODUCTS CO., INC., Appellant,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION and Secretary of Labor, Appellees.

In the Matter of ESTABLISHMENT INSPECTION OF MOSHER STEEL COMPANY.

UNITED STATES of America, Plaintiff-Appellee,

v.

MOSHER STEEL COMPANY, Defendant-Appellant.

Nos. 87-2748, 87-4519.

United States Court of Appeals, Fifth Circuit.

May 31, 1988.

Before CLARK, Chief Judge and REAVLEY, Circuit Judge and HUNTER,* District Judge.

CLARK, Chief Judge:

The district court affirmed a magistrate's denial of motions to quash two administrative search warrants authorizing programmed safety inspections of steel plants by the Occupational Safety and Health Administration (OSHA). Finding that affidavits by local OSHA agents, OSHA programmed inspection instructions and statewide industry ranking reports provided probable cause to issue the warrants, we affirm.

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* District Judge of the Western District of Louisiana, sitting by designation.

I.

We are asked to decide whether the magistrates in these consolidated cases had probable cause to issue administrative search warrants under § 8(a) of the Occupational Safety and Health Act, 29 U.S.C. § 657(a) (1985) ("the Act"). The warrants, issued in ex parte proceedings as authorized by 29 C.F.R. § 1903.4(d) (1987), permitted programmed safety inspections of Industrial Steel Products Co.'s Shreveport steel fabrication plant and Mosher Steel Products Co.'s Houston steel plant to ensure compliance with the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1985).

Industrial and Mosher were selected for programmed safety inspections based on CPL 2.45A, OSHA's standard instructions for scheduling inspections of plants for which specific safety violations have not been reported.[1] Local OSHA officials secured administrative search warrants after Industrial and Mosher refused to consent to the inspections. Having secured the warrants, OSHA officials again notified Industrial and Mosher that their plants would be inspected. Again they refused to consent and instead filed motions to quash the administrative inspection warrants. Separate hearings were held and federal magistrates denied both motions. Industrial and Mosher timely appealed the magistrates' findings of fact and recommendations. In orders dated June 8, 1987 and June 10, 1987, the district courts for the Southern District of Texas and the Western District of Louisiana adopted the magistrates' findings of fact and recommendations and denied the motions to quash. Industrial and Mosher appeal. We Affirm.

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[1] CPL 2.45A defines programmed inspections as: "Inspections of worksites which have been selected based upon objective criteria . . . The worksites are selected according to national scheduling plans for safety and for health or special emphasis programs." United States Department of Labor, Office of Compliance Programming, OSHA Instruction CLP 2.45A at II-1 (revised Apr. 18, 1983).

They are distinguishable from unprogrammed inspections which are: "Inspections in which alleged hazardous working conditions have been identified at a specific worksite . . . This type of inspection responds to imminent dangers, fatalities/catastrophes, complaints and referrals. It also includes followups." *Id.*

II.

In reviewing a magistrate's determination of probable cause, this court may only consider material which the issuing magistrate had before him. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978); *United States v. Melancon*, 462 F.2d 82, 89-90 (5th Cir.1972), *cert. denied*, 409 U.S. 1038, 93 S.Ct. 516, 34 L.Ed.2d 487 (1972). Evidence outside of the warrants may only be examined if the applications were tainted by fraud or misrepresentation. *Franks*, 98 S.Ct. at 2684. Because no allegation of fraud has been made, we will confine our review to the documents submitted with the warrant applications.

The Occupational Safety and Health Act authorizes the Secretary of Labor to enter and inspect work places at reasonable times and in a reasonable manner to ensure compliance with the provisions of 29 U.S.C. §§ 654(a)(1) and (2).[2] In *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the Supreme Court held § 657(a) unconstitutional insofar as it purported to authorize nonconsensual, warrantless inspections. *Barlow's*, 98 S.Ct. at 1827. However, the Court construed the Act to permit inspections pursuant to administrative search warrants which could be obtained upon a showing of: (1) "specific evidence of an existing violation," or (2) "'that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Barlow's*, 98 S.Ct. at 1824 (*quoting Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967)).

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[2] The Act states that the Secretary may:

"(1) enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

29 U.S.C. § 657(a) (1985).

In *Brock v. Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir.1985), this Circuit considered the adequacy of OSHA's application for a warrant authorizing the entry of an establishment selected under OSHA's programmed health inspection plan. The panel in *Gretna* made its analysis in two parts. The first considered whether OSHA's health inspection plan met the specific neutral criteria mandated by the Supreme Court in *Barlow's*. The *Gretna* panel concluded it did.

In analyzing an inspection plan, the magistrate considering the warrant application must "review the plan itself to ensure that it contains the specific neutral criteria mandated by *Barlow's.*" *Gretna*, 769 F.2d at 1112. Essentially, this part of the test requires the magistrate to determine that the plan as a whole is susceptible of neutral, nonarbitrary application.

[1] We are satisfied that this prong was met in Industrial's and Mosher's case. The magistrates reviewed copies of CPL 2.45A and descriptions of the programmed inspection plans submitted with the warrant applications. Our examination of this same material discloses that CPL 2.45A and the inspection plans are based on specific, neutral criteria.

The plan states that the national OSHA office will provide each regional office with a statewide industry ranking report classifying all industries within the state under a Standard Industrial Classification (SIC) code. The SIC code is a four-digit number which classifies industries by what they manufacture (for example, wood partitions and fixtures or canned and cured seafoods). All industries within a given SIC code are then assigned a Lost Work Day Injury (LWDI) rate calculated by the Bureau of Labor Statistics. The LWDI rate reflects the average number of work days per 100 full-time employees lost by employees in that industry as a result of occupational injury or sickness.

To target specific businesses within a state for inspection, OSHA's national office provides each regional office with establishment lists stating the names and addresses of all

businesses in the state in each SIC code on the statewide industry ranking report. There is one establishment list for high-hazard industries (defined as industries with an LWDI rate above the national average of 3.4), one for low-hazard industries, and one for nonmanufacturing industries. The national office obtains these names and addresses from Dun's Marketing Service. The establishment lists rank industries in descending order starting with the industry in the SIC codes having the highest LWDI rate. Within each SIC code, businesses are separated by county and then placed in alphabetical order.

Using specific criteria supplied by OSHA's area director, the regional office then adds or deletes establishments from the high-hazard establishment list. An establishment may only be added if it has more than ten employees but the national office thought it had fewer than ten, or if it was unlisted but is believed to be within an SIC code on the statewide industry ranking report. An establishment may only be deleted if: it cannot be located, is no longer in business, is out of area office jurisdiction, is a nonplant corporate office, has been listed under an incorrect SIC code and the correct SIC code is not on the statewide industry ranking report, a safety inspection has been conducted within the current or previous two fiscal years, it has ten or fewer employees, or its actual LWDI rate is found to be lower than the national average during an OSHA health inspection. Deletions may be made for other reasons only upon the approval of OSHA's regional administrator and director of field operations. After additions and deletions have been made, establishments on the list are numbered consecutively.

Next, each regional office compiles an inspection register naming establishments within its jurisdiction which will be inspected during the current fiscal year. The number of establishments on the register is determined by doubling the number of programmed inspections projected for the fiscal year (to account for establishments later found to be exempt) and subtracting any uncompleted inspections carried over from the previous fiscal year. Ninety percent of

that number is taken in rank order from the top of the high-hazard establishment list. Five percent is selected randomly from the low-hazard establishment list and five percent from the nonmanufacturing list. The random selections give low-hazard and nonmanufacturing businesses incentive to comply with OSHA guidelines. The register is then divided into two equal cycles. With certain limited exceptions, each establishment in the first cycle (the "worst" establishments) must be inspected before the second cycle is begun. Within each cycle, establishments may be inspected in the order that makes the most efficient use of OSHA's resources. Establishments on the register will be exempt from a comprehensive inspection if a preliminary review of their OSHA logs and injury records reveals a lower than average LWDI rate. However, every "tenth establishment" will receive a full-scale inspection regardless of its actual LWDI rate. This assures that even if businesses falsify their injury records, they still may be subject to inspection.

This plan is based on specific, neutral criteria. Establishments employing the most workers and having the highest LWDI rates are subject to the most frequent inspections. OSHA's assertion that it has insufficient resources to inspect every establishment is undisputed. Thus, it is reasonable for OSHA to concentrate on the largest, most dangerous businesses. The addition of some low-hazard and non-manufacturing firms to the register and the comprehensive inspection of some firms with low actual LWDI rates enhances the plan's neutrality. These devices further OSHA's legitimate goals of encouraging all firms to comply with its regulations and discouraging firms with high LWDI rates from manipulating accident statistics to avoid comprehensive inspections.

Inspecting firms within a cycle in the order that makes the most efficient use of OSHA's resources casts no shadow on the plan's neutrality. Establishments from the top of the high-hazard list will be in the first cycle and will all be inspected before inspection of the lower-hazard firms in the second cycle begins. In an inspection scheme as pervasive as this one, maintaining precise order is neither always possible nor essential to neutrality. Subjecting a high-hazard firm

with a slightly lower LWDI rate to inspection before a higher-hazard firm is not arbitrary. *See, e.g., Donovan v. Trinity Industry, Inc.*, 824 F.2d 634, 636 (8th Cir.1987). All firms within a cycle will be inspected in the space of several months in any case. Rearranging their order within the cycle is not discriminatory as Industrial and Mosher contend. Because it furthers OSHA's legitimate goal of efficient resource allocation, it is reasonable.

Industrial argues that the plan is not neutral because firms on the top of the high-hazard establishment list are repeatedly inspected while firms on the bottom of the list may never be inspected. By way of illustration, Industrial states that there are approximately 1400 firms on the Louisiana high-hazard establishment list. If the 300 firms from the top of the list are placed on the register each year, and are only exempt if they've been inspected in the past two years, then the 500 firms on the bottom of the list will never be subject to inspection.

Industrial's agrument assumes that the establishment lists are unvarying from year to year. This is not the case. Indeed, the whole purpose of OSHA inspections is to cause LWDI rates to change for the better.

Businesses move up and down the establishment list each year as the LWDI rate for their SIC code changes. Mosher Steel is a prime example. The LWDI rate for SIC Code 3441 establishments in Texas was 7.0 in 1985 and had changed to 8.9 by 1986. Hence, it is not true that firms on the top of the establishment list will remain at the top and be subject to repeated inspections. Most high-hazard businesses will eventually be fair game for inspection as they move up or down the list. With this in mind, it is legitimate for OSHA to single out for inspection firms appearing at the top of the high-hazard list in a given fiscal year.

III.

Gretna also required the magistrate be able to determine that the business opposing the warrant was appropriately selected for inspection under the plan's neutral criteria. This determination requires the magistrate's "consideration of the plan's industry rank list for the state in question and the methodology used in the selection of the particular establishment." *Gretna*, 769 F.2d at 1112. *Gretna* goes on to state that the magistrate "should also be informed of the Secretary's perception of the desired frequency of inspections of companies on the establishment list and the actual inspection history of the business in question." *Gretna*, 769 F.2d at 1112. Because the warrant applications in today's cases supplied this information, it is unnecessary for us to decide whether this precatory language should be read as essential to any finding of probable cause.

The warrant applications before us contain more than enough information to support the magistrate's findings that OSHA had satisfied the second part of *Gretna*. Each application appended a copy of the applicable statewide industry ranking reports. Affidavits submitted with the warrants reviewed the methodology used to select Industrial and Mosher and appended copies of CPL 2.45A. One affidavit was sworn to by a local OSHA compliance officer and the other by an OSHA safety supervisor.

Industrial and Mosher argue that the affidavits failed to establish probable cause because they were not based on personal knowledge. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958). They contend that not only did the affiants fail to allege personal knowledge, but, in fact, they did not have personal knowledge because they did not know how the establishment lists were compiled or what local additions or deletions had been made to the lists. Additionally, one affiant was not involved in scheduling inspections and did not personally review the statewide industry ranking report, the inspection register or the establishment list.

Industrial and Mosher are giving an unduly technical and restrictive reading to the affidavits. *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 747, 13 L.Ed.2d 684 (1965). One affiant, a compliance officer, regularly conducted OSHA inspections. The other, a safety supervisor, was responsible for enforcing the Act in 26 Texas counties and for scheduling inspections to be conducted by compliance officers. Both have gained sufficient personal knowledge in the course of these duties to testify regarding the procedures used to select establishments for inspection. Additionally, the affiants are entitled to rely on the actions and observations of their fellow OSHA personnel to supplement their own personal knowledge. *Ventresca,* 85 S.Ct. at 747; *United States v. Flynn,* 664 F.2d 1296, 1303 (5th Cir.1982), *cert. denied,* 456 U.S. 930, 102 S.Ct. 1979, 72 L.Ed.2d 446 (1982).

The Secretary argues that Mosher is collaterally estopped from arguing lack of personal knowledge because the issue was previously litigated and decided adversely to its parent corporation, Trinity Industries. *See, Donovan v. Trinity Industries, Inc.,* 824 F.2d 634, 636 (8th Cir.1982). However, the Secretary waived the affirmative defense of collateral estoppel by failing to raise it before the district court. *Mozingo v. Correct Manufacturing Corp.,* 752 F.2d 168, 172 (5th Cir. 1985).

Each affidavit contains a detailed description of how the plan was executed.[3] These affidavits contain ample information to enable the magistrates to decide that Industrial and Mosher were appropriately chosen by an application of the plan's neutral criteria.

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[3] Both Industrial and Mosher fell within SIC Code 3441 which carried a high-hazard LWDI rate of 8.9 for the State of Texas and 9.7 for Louisiana in 1986. The affidavits state that 329 inspections were projected in Baton Rouge for fiscal year 1986 (with an additional 162 carried over from fiscal year 1985) and 179 in Houston. They state that these numbers were doubled, the number of inspections carried over was subtracted, and ten percent of the total was subtracted to allow for inspections of low-hazard and nonmanufacturing establishments. The resulting number of establishments, 429 for Baton Rouge and 356 for Houston, were taken in rank order from the top of

Information regarding the Secretary's perception of the desired frequency of inspections also was available for the magistrates' consideration. The affidavits state that, pursuant to the plan, an establishment will be exempt if it has undergone a programmed or unprogrammed safety inspection within the previous two fiscal years or the current fiscal year. The plan indicates that high-hazard establishments should be inspected for safety no more often than once every two to three years. Both Industrial and Mosher have been inspected somewhat more frequently. However, neither has been inspected within the previous two years.[4]

Mosher contends that it has not been inspected in accordance with the Secretary's desired frequency because the affidavit misrepresented its actual inspection history. However, even under Mosher's version of its history, it would not qualify for an exemption by reason of inspection in the previous two fiscal years or the current fiscal year.

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the high-hazard establishment lists and placed on the inspection registers. Industrial and Mosher were chosen using this method and were placed in the first cycle one of their respective registers. Mosher was carried over from the 1985 inspection register and was scheduled for a comprehensive inspection because its records did not reveal an actual LWDI rate lower than the national average. Industrial was selected in fiscal year 1986. Although its injury records revealed an actual LWDI rate below the national average, it was scheduled for a comprehensive inspection as a tenth establishment.

[4] Mosher's actual inspection history as represented in the affidavit was as follows:

Date	Action	Result
8/10/76	Inspection	No citation issued
10/11/77	Inspection	No citation issued
1/31/78	Inspection	Serious citation and non-serious citation issued
9/15/78	Inspection	Serious citation and non-serious citation issued
1/31/80	Inspection	No citation issued
5/22/83	Inspection	Non-serious citation issued

Industrial's inspection history was as follows:

Date	Action	Result
4/29/77	Safety inspection	[None listed]
5/18/77	Health inspection	[None listed]
8/3-10/77	Follow-up	[None listed]
9/3/81	Safety inspection	[None listed]
7/21/83	Safety inspection	[None listed]

The affidavits and plan enabled the magistrate to determine that Industrial and Mosher were selected for inspection through an application of the plan's specific, neutral criteria. However, Industrial and Mosher argue that *Gretna* imposes an additional requirement — that the relevant establishment lists and/or the inspection register be appended to the warrant applications.[5] Industrial and Mosher find support for this argument in a portion of *Gretna* which reads:

> "But the application contained neither the establishment list nor a description of the procedure followed in the selection of Gretna.
>
> . . . .
>
> . . . Indeed, OSHA provided the court in this case with an industry rank list from Connecticut and an establishment list from a county in Massachusetts. We see no reason why OSHA could not have provided the court with the relevant lists from Louisiana, encoded to protect the identity of other inspection targets."

769 F.2d at 1113 and n. 6.

[2] Industrial and Mosher interpret this language to *require* that encoded establishment lists be appended to every warrant application. They argue that without encoded

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[5] No other Circuit requires OSHA to append establishment lists to their warrant applications. In fact, no other Circuit requires that OSHA append statewide industry ranking reports. *See, e.g., Pennsylvania Steel Foundry & Machine Co. v. Secretary of Labor*, 831 F.2d 1211, 1215 (3rd Cir. 1987) (warrant application need only describe the program and aver that the work site fits within the program); *Donovan v. Trinity Industries, Inc.*, 824 F.2d 634, 636 (8th Cir. 1987) (warrant application must contain a detailed description of the plan and the procedure used to select an establishment for inspection); *Donovan v. Enterprise Foundry, Inc.*, 751 F.2d 30, 33 (1st Cir. 1984) (affiant need only explain plan and state that the firm was chosen pursuant to its neutral criteria); *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 988-89 (9th Cir. 1980) (warrant application must explain plan, aver that company was selected according to plan and cite above-average injury rate in relevant industry).

establishment lists or inspection registers, the magistrate cannot determine if local additions and deletions have been properly made to the list, if the list is in worst-first order, if it is complete and if it was compiled by a correct application of the neutral criteria. Industrial and Mosher state that a simple description of how the establishment lists were compiled is not adequate because without the lists themselves, the magistrate can't ascertain that the neutral procedures were actually used.

A footnote in *Gretna* observed that local additions and deletions are a matter for concern because "[o]therwise, OSHA officers could harass businesses or effectively exercise the kind of unbridled discretion which concerned the Supreme Court in *Barlow's.*" *Gretna,* 769 F.2d at 1113, n. 7. However, they are not a problem in this case because the affidavits alleged that only local additions and deletions "appropriate" under CPL 2.45A were made. In the absence of evidence to the contrary, the magistrates are entitled to rely on these representations. Neither Industrial nor Mosher attempted to show that they were inappropriately added at the local level because they were both on the lists supplied by the national office.

Industrial contends that many of its competitors were inappropriately deleted from the establishment list. It cites statistics from the Louisiana Department of Commerce placing 93 businesses in Louisiana in SIC Code 3441. OSHA's Statewide Industry Rank Report for Louisiana only listed 42 businesses in Louisiana under SIC Code 3441. However, because these "deletions" did not occur at the local level, they do not raise the concerns expressed in *Gretna.* Nor can we conclude from anything shown by Industrial that the national office arbitrarily deleted Industrial's competitors from the list. OSHA applies its programmed inspection plan nationwide and therefore uses national directories classifying establishments by SIC code. OSHA couldn't feasibly rely on state directories because not all states publish them, some classify industries using different criteria than the national directory, some states use

their directories for advertising purposes so businesses represent that they deal in more than one industry and some states publishing directories don't require that businesses include information in them.

Gretna does not mandate that an encoded establishment list or inspection register be adduced in the application for an administrative warrant in order to show probable cause. Local officials have the option of supplying either an encoded establishment list or the register; or, a description of how the list and register were compiled. The test is whether the magistrate can be satisfied that the target establishment was placed on the register by an application of the plan's specific, neutral criteria. The absence of an encoded establishment list will only be fatal to a warrant application where the target company can make a factual showing that it was placed on the list for reasons other than the application of specific, neutral criteria.[6]

Industrial's and Mosher's suggestion that the magistrate should review the establishment list for completeness and neutrality would, in effect, require the magistrate to determine that every firm on the list was fairly placed there and that no firm was unfairly deleted. The Fourth Amendment does not impose such stringent requirements. To meet the standards set by *Barlow's*, the magistrate need only conclude that an application of the neutral plan resulted in the selection of the individual establishment contesting the warrant. Absent a specific factual showing by the firm contesting enforcement of the warrant, OSHA is not required to demonstrate that the plan was applied neutrally to every establishment on the list.

If a contestant puts forward proof that businesses were arbitrarily added to or deleted from the list, the court can no longer rely on the affiant's representations that a specific neutral plan had been properly applied. Such a showing

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[6] Requiring that an applicant for an administrative search warrant submit *either* the inspection register or establishment list; or, a description of the procedures involved comports with the Eighth Circuit's view. *See Donovan v. Trinity Indus., Inc.* 824 F.2d 634, 637 (8th Cir. 1987).

In The United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 87-4519

IN THE MATTER OF:

INDUSTRIAL STEEL PRODUCTS CO., INC.
Appellant,

versus

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION
and SECRETARY OF LABOR,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5/31/88, 5 Cir., 198__, _____F.2d ____)
(June 27, 1988)

Before CLARK, Chief Judge, and REAVLEY, Circuit Judge and HUNTER,* District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK

United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation.